

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE)
CONDITIONAL USE PERMIT ISSUED)
BY THE CITY OF WESTPORT TO)
THE PORT OF GRAYS HARBOR AND)
CONDITIONALLY APPROVED BY)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
)
FRIENDS OF THE EARTH,)
)
Appellants,)
)
v.)
)
CITY OF WESTPORT, PORT OF)
GRAYS HARBOR, and STATE OF)
WASHINGTON, DEPARTMENT OF)
ECOLOGY,)
)
Respondents.)

SHB No. 84-63

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the request for review of a shoreline management substantial development and conditional use permit approved for a modular assembly and barge loading facility on Grays Harbor in the City of Westport, came on for hearing before the Shorelines Hearings Board; Lawrence J. Faulk, presiding, Gayle Rothrock, Rodney M.

1 Kerslake, and Nancy R. Burnett, Members, on April 11 and 12, 1985, 1
2 Westport and Lacey, Washington. Wick Dufford has read the transcript
3 of the first day and participated in the hearing on the second day.
4 The Board viewed the site during the first day of the hearing. The
5 proceedings were officially reported by Bibi Carter and Lisa Flechtner.

6 Appellants were represented by their Northwest Representative
7 David E. Ortman. Respondent City of Westport was represented by City
8 Attorney William Morgan. Respondent Department of Ecology was
9 represented by Assistant Attorney General Jay J. Manning. Respondent
10 Port of Grays Harbor was represented by attorney Dennis Colwell.

11 Witnesses were sworn and testified. Exhibits were admitted and
12 reviewed and oral argument was heard. From the testimony, evidence
13 and argument, the Board makes these

14 FINDINGS OF FACT

15 I

16 Appellant Friends of the Earth is an environmental organization
17 with members throughout the country and the state, including members
18 in Grays Harbor County who use and enjoy the site which is the subject
19 of this hearing. One such member, Mr. Duree, testified.

20 Respondent City of Westport is a municipal corporation containing
21 shorelines subject to regulation under the Shoreline Management Act
22 (SMA), chapter 90.54 RCW. The site in question is within such
23 shorelines.

24 Respondent Port of Grays Harbor is a public entity formed under
25 the laws of this state which, among other things, engages in the

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1 development of water transfer and terminal facilities and industrial
2 improvements.

3 Respondent Department of Ecology is a state agency with
4 responsibilities for enforcement of the SMA, including the approval or
5 disapproval of conditional use permits.

6 II

7 The proposal at issue here is on the waterfront of the City of
8 Westport. Projected activity includes preparation and use of the site
9 for the assembly of oil exploration and production modules with an
10 associated barge loading facility that would be used to bring in
11 materials and to move out the modules.

12 Approximately 1.0 acre of filling and 5.5 acres of dredging of
13 sand and silt to an average depth of minus 3.0 feet is planned. The
14 site covers some 37 acres. It will be leveled and capped with a
15 semi-impervious layer of gravel. Piles will be driven for barge
16 moorage. Parts of the site will be side-sloped and riprapped. The
17 actual assembly sites are proposed to be concrete pads.

18 Modules of up to 85 feet in height will be constructed and then
19 moved to the barge loading facility for dead-loading the barges.
20 Because of the weather patterns in Grays Harbor, typical construction
21 would be to assemble the exterior of the module, first. The contents
22 of the module would then be assembled inside what would appear to be a
23 metal building. A storm water drainage system will be installed at
24 the site. The port estimates a site user will employ anywhere from 75
25 to 500 people.

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III

The majority of the proposed development is situated on dry land within the 200 feet of the ordinary high water mark (OHWM) on a Shoreline of Statewide Significance. All of this portion of the site is classified as Urban environment. A small portion below the OHWM is classified as Conservancy environment under the City of Westport Shoreline Master Program (WSMP).

IV

Appellants seek disapproval by the Shorelines Hearings Board of a shoreline substantial development and conditional use permit granted by the City of Westport and the Department of Ecology to the Port of Grays Harbor for the proposal.

V

The proposed site is currently filled to an elevation of +17, has a rock pier and a heavy haul road used by the Corps of Engineers for Westport jetty repair. The adjacent property uses include the Coast Guard Station, a fishboat marina, a ship building facility, the Westport Airport and vacant areas. To the southeast is a sizeable wetland. There are no residential uses in the immediate area. The site is currently unused and most of the waterfront has been riprapped. The shoreline where a barge slip is proposed is unimproved.

The upland part of the proposed site has a shoreline designation of Urban environment. The barge loadout facility is located in both the Urban and Conservancy environments.

1 VI

2 No evidence established that more than a moderate effect on the
3 quality of the environment is a reasonable probability from
4 prosecuting the proposal, including the dredging and filling aspects
5 of preparing the site and the storm water drainage after the project
6 is operational.

7 VII

8 The Port of Grays Harbor and the City of Westport are concerned
9 about economic development and diversification for future prosperity.
10 Growth plans and ordinances for the harbor area suggest the
11 desirability of tourism development, information and service
12 businesses, light manufacturing, and outgrowth industries of basic
13 timber, fishing, and shipping. The present draft of the Grays Harbor
14 Estuary Management Plan (GHMP) proposes that the subject site will be
15 dedicated to a rather substantial expansion of the existing fishboat
16 marina.

17 However, the Port has asked the GHMP Task Force to amend the plan
18 to allow the type of development now proposed. The reason for the
19 amendment is that the economy has changed so dramatically that there
20 is no reasonable chance in the foreseeable future that the marina will
21 require expansion. It is asserted the GHMP is some months away from
22 final approval.

23 VIII

24 On September 17, 1984, respondent Port of Grays Harbor applied to
25 the City of Westport for a shoreline management development

1 conditional use permit for the subject proposal.

2 IX

3 On September 19, 1984, and September 2, 1984, notices of the
4 project application were published in the Aberdeen Daily World. These
5 notices indicated that oral and written comments would be received.

6 X

7 On September 25, 1984, the Port issued a State Environmental
8 Policy Act (SEPA) determination of non-significance.

9 XI

10 On October 18, 1984, the notice of public hearing was published in
11 the Aberdeen Daily World. This notice did not indicate that written
12 comments would be accepted.

13 XII

14 On October 29, 1984, a mitigated declaration of non-significance
15 (MDNS) was issued by the Port of Grays Harbor after consultation with
16 various federal and state agencies with jurisdiction and expertise in
17 environmental matters. On that same day, the City of Westport held a
18 public hearing, considered all oral and written comments, and granted
19 a shoreline management substantial development and conditional use
20 permit to the Port of Grays Harbor. The permit was signed by the
21 Mayor on October 31, 1984.

22 XIII

23 On November 30, 1984, the Department of Ecology conditionally
24 approved said permit after reviewing the SMA, WAC 173-14-140, and
25 applicable portions of the WSMP. The DOE added four conditions to the

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1 permit which were agreed to by the City of Westport.

2 XIV

3 Feeling aggrieved by the DOE decision, the appellants requested
4 review by this Board on December 26, 1984. On January 14, 1985, the
5 request for review was certified by the Department of Ecology. A
6 pre-hearing conference was held on February 1, 1985, in Lacey.

7 XV

8 Any Conclusion of Law which is deemed a Finding of Fact is hereby
9 adopted as such.

10 From these Findings of Fact the Board comes to these

11 CONCLUSIONS OF LAW

12 I

13 The Board has jurisdiction over these persons and these matters.
14 Chapter 90.58 RCW.

15 In a request for review of the issuance of a shoreline substantial
16 development and conditional use permit, the appellant has the burden
17 of proving that issuance of the permit was inconsistent with the
18 Shoreline Management Act (SMA), the applicable master program (here
19 the WSMP), and SEPA. Chapter 90.58 RCW and WAC 461-08-175(a) and
20 (c). Additionally, with shoreline conditional use permits, the
21 appellant must prove that the issuance of such permits is inconsistent
22 with the conditional use criteria of the master program or WAC
23 173-14-140, whichever is more restrictive. Since in this case these
24 criteria are substantially the same, we have measured the project
25 against the master program criteria. WSMP Section 31.20.

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II

Accordingly, this proposed development is here reviewed for consistency with the WSMP, the SMA, and SEPA. The permit we review is the substantial development and conditional use permit issued by the City of Westport, incorporating the conditions set forth in the MDNS and the additional conditions added by DOE.

III

The major policy considerations of the SMA of 1971 are set forth in RCW 90.58.020. Two major policy considerations are set forth in different portions of this section of the statute, as follows:

It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.

...

Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.

IV

The SMA does not require that there be a compensating public benefit to offset the private benefits from every development permit

1 which is issued. Neither does it require compensation for
2 environmental losses. It simply requires that the public interest be
3 considered in the processing of permits for any shoreline
4 development. Portage Bay-Roanoke Park Community Council v. The
5 Shorelines Hearings Board, 92 Wn.2d 1, 593 P.2d 151 (1979).

6 Here the site is not a natural area. The majority of it has
7 already been severely impacted by human activity. The proposed
8 project does minimum damage to the ecology or environment of the
9 subject shoreline area, and minimally interferes with the public's use
10 of the beach. It is a logical extension of urban development. It
11 does not violate the general policies of RCW 90.58.020 which favor
12 water dependent uses such as port activities. Further, we conclude
13 that the proposal at the essentially urbanized site selected should
14 not be rejected on the basis of the preferences for shorelines of
15 statewide significance set forth in RCW 90.54.020.

16 V

17 WSMP, Section 16.00(4) deals with conditional uses in an Urban
18 environment. It states:

19 The following uses may be permitted when they comply
20 with the master program policies and regulations and
the criteria for conditional uses in Section 31.20:

21 Shipping; mineral extraction and storage; forest
22 products processing; heavy industries; ship
23 construction and repair; barge berthing; ship
berthing; port terminal facilities; non-appurtenant
24 signs; agricultural uses and structures; outfalls;
diking; bankline erosion control; causeways; and
landfills consistent with the other requirements of
25 this master program.

26 The proposed development is, thus, a "listed" conditional use in the

1 Urban environment.

2 VI

3 WSMP Section 18.00(4) deals with conditional uses in a Conservancy
4 environment. It states:

5 The following uses may be permitted when they comply
6 with the Master Program Policies and Regulations, and
the criteria for conditional uses in Section 31.20.

7 Single-family dwelling; fish and food
8 processing; submerged utility corridor; overhead
9 utility corridor; roads and railroads; ferry
10 terminals; mineral extraction and storage;
11 parks, parkways, and other public accesses;
piling and mooring dolphins; outfalls; bankline
erosion control; landfills consistent with the
other regulations of this master program.

12 The proposed development, then, is an "unlisted" conditional use to
13 the extent that a portion of the barge loadout facility is in a
14 Conservancy environment.

15 VII

16 Section 31.20 of the WSMP entitled "Review Criteria for
17 Conditional Uses" states:

18 The purpose of a conditional use is to allow
19 greater flexibility in varying the application of the
20 use regulations of the master program in a manner
21 consistent with the policies of RCW 90.58.020:
22 provided, that approval of conditional uses should
23 also be granted in a circumstance where denial of the
use would result in a thwarting of the policy
enumerated in RCW 90.50.020. In authorizing a
conditional use, special conditions may be attached
to the permit by the Shorelines Hearings Board to
prevent any undesirable effects of the proposed use.

24 (1) Uses which are classified or set forth in the
25 applicable master program as conditional uses may
be authorized provided the applicant can
demonstrate all of the following.

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- 1 (a) That the proposed use will be consistent with
2 the policies of the Shoreline Management Act
3 and the policies of the Westport Master
4 Program.
5 (b) That the proposed use of the site and design
6 of the project will be compatible with other
7 permitted uses within the area.
8 (c) That the proposed use will cause no
9 unreasonably adverse effects to the shoreline
10 environment designation in which it is to be
11 located.
12 (d) That the proposed use will cause no
13 unreasonably adverse effects to aquatic and
14 shorelines areas.
15 (e) That the proposed use will not have
16 substantial adverse cumulative effects.
17 (f) That there will be no substantial detrimental
18 effects to the public's interest in the area,
19 including normal public use of the shorelines.
20 (2) Other uses which are not classified or set forth
21 in the Westport Master Program may be authorized
22 as conditional uses provided the applicant can
23 demonstrate, in addition to the criteria set
24 forth in Section 31.20(1) above, that
25 extraordinary circumstances preclude reasonable
26 uses of the property in a manner consistent with
27 the use regulations of the master program.
(3) Uses which are specifically prohibited by the
master program may not be authorized.

VIII

The proposed project is a shoreline dependent use and therefore,
has a preference under the master program.

The site has already been filled and is currently used as a
heavy-haul road for jetty repair. Only a small portion of the site
will require additional fill. There will be some dredging for the
barge loading area, but there was no showing of significant
environmental harm from this activity. The site has been designed to
take advantage of the existing shorelines configuration thereby
causing minimum impact.

1 Landfills are not necessarily prohibited by the WSMP, but they c
2 and should only be authorized after careful scrutiny of the particular
3 situation. Here just one acre is being filled and no appreciable loss
4 of wetland resources was shown.

5 The WSMP policies and their implementing regulations allow both
6 shoreline dredging and landfilling, Section 8.00 of the WSMP. The
7 amalgamation of SMA and WSMP policies and regulations allowed the City
8 of Westport and the WDOE to properly conclude that the subject
9 shoreline permit is consistent with such policies and regulations.

10 The proposed use would not have any significant impact on the
11 shoreline environments involved. The module assembly and barge
12 loading facility will be compatible with neighboring permitted uses,
13 and will cause no unreasonable adverse effects to this shoreline of
14 statewide significance.

15 IX

16 Public access to the state's shorelines needs to be preserved and
17 enhanced. This proposal, in fact, does that by providing for public
18 access to the beach south of the proposed site. This will be achieved
19 by maintaining a six-foot wide corridor outside the southern fence of
20 the proposed fabrication site, so that people can walk around the site
21 and utilize the beach.

22 X

23 With conditions added to the permit and the enhancement of public
24 access to the beach, the public interest will suffer no substantial
25 detrimental effect. Thus, the requirements of WSMP Section 31.20(1)

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1 environmental impact statement under SEPA was established. ASARCO v
2 Air Quality Coalition, 92 Wn.2d 685, 601 P.2d 501 (1979).

3 XIII

4 A SEPA threshold determination by its nature focuses on the
5 potential environmental significance of a particular use of a
6 particular site. If the project impacts are likely to be moderate,
7 there is no need to look at what impacts of the same action might have
8 at another site. Alternative sites, thus, need not be considered
9 prior to issuing a DNS.

10 XIV

11 The draft GHEMP, which designates the subject site for a marina,
12 is a useful advisory document to the local and state agencies making
13 decisions relative to the Grays Harbor estuary. However, the City and
14 DOE did not act improperly in not strictly adhering to the specific
15 use designated for the subject site in the current draft of the
16 GHEMP. See Norco Construction v. King County, 97 Wn.2d 680, 649 P.2d
17 103 (1982). Further, since the draft GHEMP is not a part of the WSMP,
18 it is not determinative in the matters before this Board.

19 XV

20 The Board concludes the view of the site from any upland
21 resident(s) will not be significantly affected by this project. This
22 is because a great distance exists between the proposed project and
23 any concerned upland citizens.

24 XVI

25 RCW 90.58.140(4) of the shoreline Management Act (SMA) deals with

1 regarding conditional uses have been satisfied.

2 XI

3 As to the barge loading and related dredging activity occurring in
4 the Conservancy environment, we conclude that the requirements of WSMP
5 Section 31.20(2) are also met. Unless the site can be used for water
6 navigational transport, water dependent use of the Urban environment
7 portion of the site could be foreclosed. We do not think the City
8 intended that its split environment designation in this area would
9 interfere with navigational uses not shown to be environmentally
10 damaging. We note that both ferry terminals and piling and mooring
11 dolphins are "listed" conditional uses in the Conservancy environment.

12 XII

13 Appellants allege that the Port failed to comply with SEPA in
14 issuing its mitigated Declaration of Non-significance for the
15 proposal. Under the State Supreme Court's rule "to reach a valid
16 negative threshold determination, environmental factors must have been
17 evaluated to such an extent as to constitute prima facie compliance
18 with SEPA procedural requirements." Hayden v. City of Port Townsend,
19 93 Wn. 2d 870, 880, 613, P.2d 1164 (1980). Appellant did not present
20 evidence of environmental effects sufficient to undercut this prima
21 facie compliance. Moreover, in reviewing a threshold determination
22 "the decision of the governmental agency shall be accorded substantial
23 weight." RCW 43.21C.090.

24 Because a reasonable probability of a more than moderate effect on
25 the quality of the environment was not shown, no necessity for an

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1 notice requirements. It provides in pertinent part;

2 (4) Local governments shall require notification of
3 the public of all applications for permits governed
4 by any permit system established pursuant to
5 subsection (3) of this Section by ensuring that;

6 a) A notice of such an application is published at
7 least once a week on the same day of the week
8 for two consecutive weeks in a legal newspaper
9 of general circulation within the area in which
10 the development is proposed;

11 ...

12 If a hearing is to be held on an application,
13 notices of such a hearing shall include a
14 statement that any person may submit oral or
15 written comments on an application at such
16 hearing.

17 The testimony and exhibits offered by the City established that
18 the notice requirements were not fully complied with as required by
19 RCW 90.58.140(4)(b). This is because the notice published in the
20 Daily World on October 18, 1984, advertising the hearing on this
21 project for October 29, 1984, did not indicate that written comments
22 would be received.

23 No showing was made by appellant that interested persons failed to
24 submit written comments due to the omission of the notice. In fact,
25 the record indicates that a citizen did submit written comments and
26 the minutes of the October 29, 1984, meeting (Exhibit R-15) do show
27 that this letter was considered.

Such an omission in the notice could be fatal to a permit action
by local government if interested persons fail to submit written
comments because of that omission. It is not so in this case. (See
SHB No. 84-9, The Other Side of the Tracks Neighborhood Steering

2 XVII

3 Respondents assert that the Friends of the Earth have failed to
4 allege or demonstrate any direct injury to them; thus they have no
5 standing to challenge the mitigated DNS and the permit.

6 The Board rejects this argument. Under the SMA: (RCW 90.58.180),
7 "any person aggrieved" clearly means any person. The certification by
8 the Department and the Attorney General confers standing upon an
9 individual who requests review of a substantial development permit.
10 SEPA is supplementary to the SMA and, thus, standing to challenge a
11 substantial development permit includes standing to raise SEPA issues
12 in objecting to the permit's issuance.

13 In the alternative, even were certification not sufficient to
14 confer standing, we conclude that appellant has standing. Standing
15 has been defined as the possession of a "personal stake in the outcome
16 of the controversy," so that "the dispute sought to be adjudicated
17 will be presented in an adversary context and in a form historically
18 viewed as capable of judicial resolution." Flast v. Cohen, 392 U.S.
19 83, 101 (1968). This is in contrast to "a mere interest in the
20 problem." United States v. SCRAP, 412 U.S. 669 (1973). Such a stake
21 exists where there is an asserted injury in fact to a personal
22 interest, even though the injury may be suffered by many and even
23 though such injury may be non-economic. Sierra Club v. Morton, 405
24 U.S. 727 (1972). Mr. Duree, a Friends of the Earth member and a
25 citizen who works in Westport, testified that he enjoys the scenic

1 view of the area and that his scenic vista would be disrupted by the
2 proposed project. Therefore, appellant has standing to bring this
3 request for review. Foulks v. King County and Department of
4 Transportation, SHB No. 80-17.

5 XVIII

6 Appellants assert that because the Port does not own the site,
7 they cannot apply for a permit. The Board rejects this argument.
8 Agents often apply for permits and this Board has approved that
9 procedure. State of Washington, Department of Natural Resources v.
10 Mason County, SHB No. 83-17. In addition, we have also held that an
11 applicant need not even have an "interest" in the property in order to
12 apply for a permit. Entitlement to a substantial development permit
13 is not dependent upon the applicant's property interest, but upon the
14 nature of the substantial development permit itself under the SMA.
15 Casey v. City of Tacoma, SHB No. 79-19; Nisqually Delta Association,
16 et al. v. City of Dupont, DOE, and Weyerhaeuser Co., SHB No. 81-8.

17 Moreover, federal ownership of a portion of the site is irrelevant
18 unless the federal government itself objects to the permit. If it
19 does, it can prevent the permitted activity through its role as
20 landowner.

21 XIX

22 The proposal, as approved by the City of Westport and DOE, and as
23 presented to this Board does not define the precise use of the
24 property except to the extent that a barge load out facility is to be
25 constructed and the upland portion of the site is to be used for the

1 fabrication of building modules associated with oil drilling and
2 production. Also, the exact configuration of the improvements within
3 the upland position of the site have not been shown and, as the Board
4 understands, is dependent upon the ultimate user of the site who would
5 be fabricating the modules. Finally, evidence shows that the storm
6 drainage system has not been finally designed, is not depicted on the
7 shoreline permit plans, and is not described in detail within the
8 written materials accompanying the permit.

9 To give final approval to such unresolved project features at the
10 time of permit issuance, subject to final design after the permit is
11 issued, removes consideration of important shoreline management
12 matters from the SMA review processes and both the public and
13 interested governmental agencies are effectively excluded from the
14 process. Ultimately, the effect can be to usurp the function of this
15 Board. DOE v. Hugh Barden and City of Tacoma, SHB No. 84-27 and SHB
16 No. 84-33. Therefore, the Board concludes that only those sections of
17 the permit that specifically describe the permittee's plans in detail
18 and/or clearly indicate site improvements should be approved. Any
19 other type of action such as installation of a drainage system beyond
20 what has been described or identification of the size, location and
21 number of construction pads will require a revision to the permit,
22 pursuant to WAC 173-14-064, or will require a new permit to be secured
23 if changes are not within the scope of the approved permit.

24 XX

25 Appellants have not shown that the subject project fails to meet

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1 the requirements of either the SMA, the WSMP or SEPA. Accordingly,
2 the City of Westport's and DOE's granting of the conditional use and
3 substantial development permit should be affirmed.

4 XXI

5 Any Finding of Fact which is deemed a Conclusion of Law is hereby
6 adopted as such.

7 From these Conclusions the Board enters this
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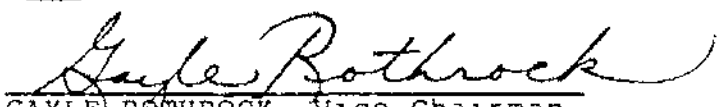
ORDER


The instant substantial development and conditional use permit decision by the City of Westport and DOE is affirmed, in accordance with Conclusion of Law XIX.

DATED this 17th day of June, 1985.

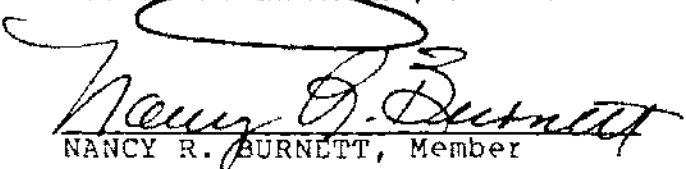
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